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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1242

INSURANCE COMPANY OF NORTH AMERICA,

Petitioner.

against

FILOR, BULLARD & SMYTH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

Petitioner, an insurance company, asks this Court to grant certiorari to decide whether a clause in one of its insurance policies is ambiguous under the common law of New York.

This case presents no issue worthy of review, particularly when a heavy load of cases raising constitutional and other important federal issues commands this Court's attention.

This Case Presents No Issue Worthy of Review

1. The ultimate issue below was whether the forgery insuring clause in INA's broker's blanket bond was ambiguous. In resolving that question, the Second Circuit quoted and applied a well-established principle of New York contract law: the words of an insurance policy are ambiguous, and must be construed against the insurer, unless they "not only are susceptible of the construction sought by the defendant [insurer] but that it is the only construction which may fairly be placed upon them" (A8, *quoting Lachs* v. *Fidelity & Casualty Co. of New York,* 306 N.Y. 357, 365, 118 N.E.2d 555, 559 [1954]).

There is no conflict between the decision below and the State courts as to the applicable standard. Accordingly, there is no occasion to review this principle of State law.

2. The Second Circuit's application of the New York ambiguity standard to the facts of this case raises no issue worthy of review. None of the criteria in Sup. Ct. R. 19 suggests that the United States Supreme Court should decide whether INA's proposed interpretation of its policy is the only fair construction. In any event, the Second Circuit's resolution of this issue plainly was correct.

The Supreme Courts of California and Michigan and the Appellate Court of Illinois all recently have held that genuine signatures on corporate documents by corporate officials are "forged" when affixed as part of a scheme to defraud the corporation—precisely the facts of this case. *Century Bank* v. *St. Paul Fire & Marine Insurance Co.,* 4

Cal.3d 319, 482 P.2d 193 (1971); *People* v. *Susalla,* 392 Mich. 387, 220 N.W.2d 405 (1974); *People* v. *Young,* 19 Ill. App.3d 445, 311 N.E.2d 609 (1974). The American Law Institute's Model Penal Code also classifies checks such as these as forgeries (A11-12 & n. 8, A14). The 1967 revision of the New York Penal Law—which adopts the ALI approach—supports the same conclusion (A11-12, A14).

While there are contrary decisions in other jurisdictions, the fact that so many respected authorities hold that checks such as these are "forged" demonstrates conclusively that the interpretation of the insurance policy that INA seeks is not "the only construction which may fairly be placed on" it. *See Pan American World Airways, Inc.* v. *Aetna Casualty & Surety Co.,* 505 F.2d 989, 1001-02 (2d Cir. 1974) (conflicting judicial decisions as to the meaning of "civil war" and similar terms render "war" risk policy exclusion ambiguous under New York law); *cf. Colautti* v. *Franklin,* 99 S.Ct. 675, 686-88 (1979) (statutory standard, the meaning of which was subject to disagreement among experts, impermissably vague).

In dealing with the ambiguity issue, moreover, the Second Circuit properly noted that INA drafted the language at issue (A6) and knew of the conflicting decisions as to the meaning of "forgery," but nevertheless failed to define the term in its policy (A9, A15). Under New York law, these circumstances require particularly strict application of the principle that ambiguous insurance policy language must be construed against the insurer. *E.g., Pan American World Airways, Inc., supra,* 505 F.2d at 1000.

The decision below therefore was correct.

3. INA's contention that the Second Circuit erred in concluding that these checks were "unauthorized" misses the ultimate issue in this case, ignores the applicable New York law, and would present no issue worthy of review in any event.

Given the substantial authority holding that instruments such as these checks are "forged," this insurance policy was ambiguous under the New York standard irrespective of whether one characterizes the signatures as "authorized" or "unauthorized." The authority issue which INA would raise goes not to the question whether the policy language is ambiguous, which is dispositive here, but to the collateral question whether Schotte "forged" these checks within the meaning of the New York Penal Law. N.Y. Penal Law §170.00, subd. 4 (McKinney 1967). The Second Circuit did not purport to decide that question and discussed it only in *dicta* (A10-15). Surely this Court should not grant certiorari to review *dicta* on a question of State law.

Even if the authority issue were central to this case, there would be no issue here worthy of review. In attempting to portray an inconsistency between the decision below and the New York Court of Appeals, INA has ignored the pertinent New York law. As the Second Circuit noted (A4 n. 2), the New York Court of Appeals has held that the genuine signature of the president of a corporation on a corporate check, affixed as part of a scheme to defraud the corporation, is unauthorized. *Wen Kroy Realty Co.* v. *Public National Bank and Trust Co.*, 260 N.Y. 84, 88-91, 183 N.E. 73, 74-75 (1932). Hence, the "authority" issue INA would raise already has been resolved against it by the State's highest court.

4. Finally, INA's effort to create an aura of public importance about this ordinary state law insurance case misses the mark.

The decision below is of no long term significance to the insurance companies, for they can rewrite their policies to exclude risks like this.

Nor is the decision below significant to the banking community. It does not alter or even refer to the law of negotiable instruments. And it is worth noting that the banking community has survived comparable decisions in California, Michigan and Illinois, states with important commercial centers.

Conclusion

The petition for a writ of certiorari should be denied.

Dated: February 14, 1979

Respectfully submitted,

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